UP IN SMOKE: FOURTH AMENDMENT RIGHTS AND THE BURGER COURT

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In at least some ways, the Burger Court did what it was expected to do.[1] In other ways, it surprised both supporters and detractors.[2]

When Warren Burger was appointed Chief Justice in 1969 by President Nixon, he was expected to lead the Supreme Court away from its liberal, value-laden approach to constitutional adjudication.[3] Many commentators anticipated that this shift would be accompanied by the overruling of the most odious (to conservatives) vestiges of the Warren Court era.[4]

A retrospective of the court's work during the seventeen years Warren Burger served as Chief Justice reveals the expected conservative trend of the Chief Justice himself,[5] as well as the Supreme Court generally.[6] It does not,

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1. *See* Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Court: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103 (1989) (appointment of conservative Justices led to more conservative voting on civil rights issues); Geoffrey R. Stone, *The Selective Activism of the Burger Court*, A.B.A. J., June 15, 1986, at 10, 10 (vol. 72) (Burger Court sided with individual on civil liberties issues in 41% of decisions to Warren Court's 66%).

2. This surprise is reflected in the title to a leading book chronicling the work of the Court during Warren Burger's tenure as Chief Justice. *See* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983) [hereinafter COUNTER-REVOLUTION THAT WASN'T]; *see also* Peter W. Lewis et al., *The Burger Court and Searches Incident to a Lawful Arrest: The Current Perspective*, 7 CAP. U. L. REV. 1, 5 (1977) (those who predicted or hoped for overruling of Warren Court decisions may have been disappointed); Gene R. Nichol, Jr. *An Activism of Ambivalence*, 98 HARV. L. REV. 315, 315 (1984) (reviewing *The Burger Court: The Counter-Revolution That Wasn't*) (Burger Court less conservative than some commentators had predicted or feared).

3. *See* Segal & Spaeth, *supra* note 1, at 106; Lewis et al., *supra* note 2, at 4-5; *Transcript of the President's Announcement of Two Nominees for the Supreme Court*, N.Y. TIMES, Oct. 22, 1971, at 24.

4. *See* Anthony Lewis, *Forward*, *in* COUNTER-REVOLUTION THAT WASN'T, *supra* note 2, at vii.

> When Warren E. Burger succeeded Earl Warren as Chief Justice of the United States in 1969, many expected to see the more striking constitutional doctrines of the Warren years rolled back or even abandoned. The reapportionment cases, *Brown v. Board of Education* and the other decisions against racial discrimination, the criminal law decisions imposing what amounted to a code of fair procedure on the states, the cases enlarging the freedom of speech and of the press: In these, it was often said, the Warren Court has made a constitutional revolution. Now a counter-revolution was seemingly at hand.

Id.

5. *See* Segal & Spaeth, *supra* note 1, at 106 (Burger more conservative on civil liberties issues than all other Justices except Rehnquist).

6. *See* Segal & Spaeth, *supra* note 1, at 104, 106.

however, reflect wholesale rejection of the most controversial civil liberties decisions rendered by the Warren Court.[7] It is also unclear that Chief Justice Burger was responsible for the Court's retrenchment on civil liberties where it did occur.

Warren Burger has been described as a man of "limited capacity and no discernible coherent philosophy."[8] To the extent this description is accurate, it is less likely that the Chief Justice "led" the Court away from civil liberties and more likely that he simply added his own vote to that of colleagues with a clearer vision and more defined agenda.

If one tries to discern a strategy in the restructuring of civil liberties, and especially search and seizure rulings, several conclusions are possible. One might conclude that the Burger Court was fragmented, and that various combinations of Justices approached different issues in different ways[9] so that no unified strategy was possible.[10] Or one might deduce instead that the "strategy" for change was cleverly subtle, making the Court's decision appear to be born of hopeless disagreement while they were instead the product of a patient and relentless pursuit of "law and order."

A paranoid mind is not required to adopt the latter view, but experience with group decision making would make one skeptical that disharmony could be orchestrated so skillfully. A more tempered view might be that the Burger Court lacked the moral compass and conceptualization skills of the Warren Court,[11] but moved nevertheless, and against the will of the minority, in a common direction. There may well have been no "mastermind" orchestrating this "strategy" but instead a group of single-minded Justices who simply had the same goal in each case and went about achieving it in different, but collectively effective, ways. Disharmonious groups often do move in discernible patterns toward goals targeted by a few of their members. When the Supreme Court does this, it may be because of the strong leadership of its Chief Justice, or it may be because one or more of the associate Justices is

7. *See* Nichol, *supra* note 2; Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, in COUNTER-REVOLUTION THAT WASN'T, *supra* note 2, at 62, 91; Jerold H. Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1324 (1977) (Burger Court has not undermined most of the basic accomplishments of Warren Court in protecting civil liberties).

8. Vincent Blasi, *The Rootless Activism of the Burger Court*, *in* COUNTER-REVOLUTION THAT WASN'T, *supra* note 2, at 198, 211.

9. *See* Robert S. Irons, *The Burger Court: Discord in Search and Seizure*, 8 U. RICH. L. REV. 433, 434 (1974) (disagreement on Fourth Amendment issues indicates "profound cleavages in fundamental concepts among the Justices").

10. Since fragmentation virtually always exists within the Supreme Court, adoption of this view might logically lead one to the further conclusion that Warren Burger lacked the consensus-building skills necessary to lead the Court in any particular direction. Considering the strong personalities that often populate the Supreme Court, Burger's job might have been like that of the proverbial law school dean for whom leadership resembles an effort to herd cats.

11. Professor Vincent Blasi contrasts the Warren and Burger courts by noting, "The Warren Court's activism was different. In that era the Justices had a moral vision and an agenda." Blasi, *supra* note 8, at 216.

working effectively to advance his or her agenda. Even the Warren Court, which seems monolithic by comparison with its successor Court, is an example of this phenomenon.

Commentators have noted Earl Warren's ability to produce consensus, at least regarding result, on highly controversial legal issues.[12] If Warren Burger was less able to achieve unanimity, or even much uniformity, he was nevertheless arguably able to achieve the effect he desired in Fourth Amendment law.[13] The Warren Court stood for certain principles; the conservative element of the Burger Court appeared to stand for one: find a way to put the criminal defendant in jail and keep him there.[14]

Numerous ways were found to do this "individual justice," and the net result was the diminution of individual privacy rights. It was not pretty, but it worked.[15] And in the end, it is hard to say the Court's splintered decisions have had any less impact on the evolution of the Fourth Amendment than

12. Professor Leon Friedman characterized the Chief Justice in this way: "Earl Warren was an effective presider over conference sessions - a practiced persuader, compromiser, a cajoler, if necessary, to get the required votes. He also was the moral leader of a Court that made or started fundamental, even revolutionary, changes in American law and politics." Leon Friedman, *Chief Justice Warren E. Burger: The Community's Protector*, 72 A.B.A. J., June 15, 1986, at 14, 14.

13. The most notable exception, of course, is in the exclusionary rule. Chief Justice Burger, but not the Court as a whole, would have abandoned the rule entirely, presumably overruling Mapp v. Ohio, 368 U.S. 871 (1960). While the Court never came to this position, its decisions during Burger's tenure greatly undermined the effectiveness of the rule. *See* Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1443-44 (1987).

It must also be noted that Warren Burger may not have been "achieving" this result any more than a rider can be said to control the bus. The Chief Justice may have been just one more vote among the growing number who for their own reasons favored affirmance of convictions in search and seizure cases.

14. This view that the Warren Court was "principled" may be merely the result of the more open stand the Court took on issues. It overruled anachronistic cases and announced sweeping decisions written in the most general language with a decidedly moral tone. The Warren Court may not in reality have been so much more a defender of the Fourth Amendment, or other rights of those suspected of crime; it may simply have more often dealt with high-flown principles about which there could be little disagreement. It is, after all, the specific cases that test one's beliefs.

Yale Kamisar concludes that the Warren Court did not advance the rights of the accused so much as is commonly believed. Speaking of the Court, he wrote:

> Although it was often accused of being overly solicitous of criminal suspects, the Warren Court legitimated challenged law enforcement tactics on more occasions than is generally realized. Despite its public reputation as a bold, crusading court, more often than not its criminal procedure decisions reflected a pattern of moderation and compromise.

Kamisar, *supra* note 7, at 63.

15. Professor Wasserstrom has expressed this view in much the same way:

> What the Court is doing to the fourth amendment does not, in my view, make a very pretty picture. But at least this much can be said for those decisions: They accomplish their purpose of enhancing the coercive and investigative power of the police in a far more direct and forthright way than do decisions tampering with the exclusionary rule.

Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 400 (1984).

did the more sweeping, graceful, and principled creations of the Warren Court.[16]

The fact that a series of decisions significantly impacts an area of law does not necessarily reveal or define either a strategy or an agenda of the decision maker. It does, however, provide at least some slight evidence of both. One plausible explanation for the achievement of a goal (like the advancement of law enforcement interests over privacy rights) is that a strategy underlay the accomplishment.[17] Consistent outcomes are unlikely to be the product of serendipitous coincidence, and the consistent use of a particular method of decision making suggests strategy. Where consistency of method and a trend toward some goal can be observed together in a series of decisions, it is logical to conclude that some conscious strategy is at work.

Further evidence that the Burger Court adopted a Fourth Amendment strategy lies in its activism. Despite protestations to the contrary, the Burger Court was an activist court, although its brand of activism has been described as "rootless."[18] While activism does not necessarily also require a defined strategy, no realistic constitutional activist can expect to succeed for long in an environment of collegial decision making without employing some strategic devices.

Therefore, if the charge that the Burger Court was "activist" in the area of search and seizure law is accepted as true, and if one also accepts the premise that a decidedly "law and order" result was achieved in many, if not most, of the Court's Fourth Amendment cases, it should be possible to uncover a deliberate "strategy" or method of decision making in what otherwise appears to be an odd collection of pluralistic holdings.

Because these clues of a strategy *are* found in the Fourth Amendment decisions of the Burger Court, it is unlikely that the changes in approach to individual privacy "just happened." While it may never be possible to discern which Justices of the Court devised or implemented this strategy (if it was a strategy), it might at least be possible to describe what the strategy was and anticipate how it might be used in the future. If this "strategy" existed within the Burger Court, does it persist in the Rehnquist Court? And if it does, what does its existence mean for the future of the Fourth Amendment?

The Strategic Use of Confusion in Fourth Amendment Adjudication

The Burger Court has received some "credit" from notable observers of criminal procedure for failing to overrule the best known decisions of the Warren Court, the very decisions that apparently prompted President Nixon

16. *See* Blasi, *supra* note 8, at 216 (some of Burger Court's decisions have had "profound impact on the political life of the nation").

17. Observers who have no faith in happenstance and coincidence prefer such an explanation.

18. *See* Blasi, *supra* note 8, at 198. The fact that the activism of the Burger Court may have been "rootless" does not make it less deliberate. As Professor Blasi concludes, "Rootless activism is activism nonetheless." *Id.* at 217.

to appoint Warren Burger.[19] A reader of these commentaries can almost hear the collective sigh emanating from the immensely relieved authors who could not quite believe that the exclusionary rule, *Miranda*,[20] and other protections for those suspected or accused of crime remained intact.

Of course, these observers understood that much of the infrastructure of the Fourth, Fifth, and Sixth Amendments had been seriously damaged by the Burger Court,[21] but they seemed grateful, and properly so, that the principle-laden decisions of the Warren Court era remained at least as symbolic reminders of better times.[22] Albert Alschuler has characterized this period as one of "a prolonged and rather bloody campaign of guerrilla warfare" by the Burger Court.[23]

This warfare has not generally been seen as part of a strategy to limit the Fourth Amendment, but rather as the product of a disjointed effort by a Court unable or unwilling to "chart a clear course."[24] There are, however, reasons to believe that this guerrilla warfare was waged deliberately and effectively to accomplish *sub silentio* what could not be done in the light of day.

For many reasons, the Supreme Court does not recklessly discard unwanted precedent in favor of changing, contemporary versions of the Constitution.[25]

19. *See* Alschuler, *supra* note 13, at 1436. Professor Alschuler observed that

> [a]lthough President Nixon had promised to redress Warren Court decisions that had favored the "criminal forces" over the "peace forces," the anticipated Burger Court counterrevolution in criminal procedure never materialized. The Court overruled only one landmark decision of the 1960s due process revolution, and some of its decisions notably expanded defendants' protections in criminal cases.

Id. at 1441. Yale Kamisar also has argued that the record of the Burger Court is much less prosecution-oriented than is commonly believed. *See* Kamisar, *supra* note 7, at 68.

20. Miranda v. Arizona, 384 U.S. 436, *reh'g denied*, 385 U.S. 890 (1966).

21. *See* Alschuler, *supra* note 13, at 1442.

22. *Id.* Professor Alschuler observed, "[The Burger Court] typically left the facade of Warren Court decisions standing while it attacked these decisions from the sides and underneath." *Id.*

23. *Id.*

24. *Id.* at 1441. Professor Alschuler observed that "[t]he Court's rulings did not follow the path that any single justice would have chosen." *Id.* at 1437.

25. As Professor B.J. George, Jr., reminds us: "No reconstituted Supreme Court ever repudiates wholly the doctrines of its predecessors; the doctrine of stare decisis retains enough vitality to temper whatever desire there may be to wipe away completely certain inherited precedents. This is as true of the Burger Court as of many of its predecessors." B. J. George, Jr., *From Warren to Burger to Chance: Future Trends in the Administration of Criminal Justice*, 12 CRIM. L. BULL. 253, 254 (1976). A more cynical view is reflected in the comment of Professor Alschuler:

> The Supreme Court has a larger constituency than purist law professors — a constituency that knows little of the Court's dubious doctrinal distinctions. When two-thirds of a prior decision disappears slowly in half a dozen small bites, the public's perception of the Supreme Court may not change very much. Were the Court to swallow the disfavored precedent in a gulp, however, the impression that constitutional law is no more than the preference of five justices might grow stronger.

Alschuler, *supra* note 13, at 1452-53.

Predictability is an important stabilizing factor that cannot be casually undermined in the name of expediency.[26] Moreover, the Fourth Amendment embodies fundamental principles which, at least in general terms, have a stature that makes more difficult any overt effort to abandon them.[27] These factors militate in favor of surreptitious alteration and diminution of announced doctrine rather than abrupt abandonment, even if that doctrine was highly controversial or widely disfavored when it was announced.[28]

Although numerous examples exist of this "sniping" at the Fourth Amendment, and at other protections within the Bill of Rights,[29] two of these examples sufficiently illustrate the directions taken by the Burger Court in adjudicating search and seizure cases. One is the development of "bright-line rules." The other is the expanded use of reasonableness as the touchstone of the Fourth Amendment.

It may appear at first glance that these lines of analysis are philosophically inconsistent with each other. "Bright lines" connote simplicity and improved understanding, especially by law enforcement personnel. "Reasonableness," on the other hand, is virtually synonymous with flexible but ad hoc decision making. In reality, both forms were employed by the Court to confuse and conceal. "Bright-line" rules complicated the task of law enforcement personnel and led to diminished understanding of the standards by which their searches would be judged. The "reasonableness" analysis consistently produced procedural and substantive "wins" for the government, not the sophisticated, context-based reasoning that might have resulted.[30]

One appreciates the sweep of these processes by considering the structure of the Fourth Amendment and the way it has been enforced. The amendment itself is usually viewed as consisting of two principal components: the "probable cause and warrant" clause and the "reasonableness" clause.[31] The requirement that a search or seizure be "reasonable" has been given an independent and coequal status with the more venerable (and obvious) "probable cause and warrant" clause.[32] "Bright-line" rules are usually for-

26. Oliver Wendell Holmes regarded prophecies about what courts will do in a given case as the equivalent of "law." *See* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

27. *See* California v. Hodari D., 111 S. Ct. 1547, 1562 (1991) (Stevens, J., dissenting) (Fourth Amendment values are "fundamental and enduring"). Every graduate of a high school civics class probably agrees in principle with the Bill of Rights. It is the application, and not the theory, of the rights that often meets with disapproval.

28. The *Miranda* warnings are so well known to readers, moviegoers, and television viewers that the abandonment of the requirement might well be felt as a loss by the public. Practically speaking, overruling *Miranda* might have very little effect on the use of the warnings in criminal investigation, whatever its impact might be on the admissibility of evidence.

29. *See* Alschuler, *supra* note 13; Israel, *supra* note 7.

30. *See* Silas J. Wasserstrom & Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19 (1988) (proposing increased use of context-based balancing to determine reasonableness).

31. *See* Lewis et al., *supra* note 2, at 8-9; Wasserstrom, *supra* note 15, at 281. The particularity requirement has been intentionally omitted for purposes of this discussion.

32. *See* George, *supra* note 25, wherein the author observes, "[a] majority of the Court

mulated to apply exceptions to the "probable cause and warrant" clause. Manipulation of the requirement for reasonableness, taken with the creation of bright-line rules governing exceptions to the probable cause and warrant requirements, therefore carries the potential for greatly modifying the way in which the Fourth Amendment is applied.

Reasonableness: A License to Kill (The Fourth Amendment)

Warren Burger did not invent reasonableness, nor was he the first to introduce it in a Fourth Amendment case. The Warren Court subjected the amendment to a reasonableness analysis in *Terry v. Ohio*[33] the year before Warren Burger became Chief Justice.[34]

In *Terry*, an experienced police officer observed two men who appeared to be "casing" a store for a robbery attempt. When the officer approached the men and made inquiries, they "mumbled something" in response. Officer McFadden then patted down the outer clothing of one of the suspects. He felt a pistol and removed it from the man's overcoat pocket. A similar search of the man's companion uncovered another revolver. The men were charged with carrying concealed weapons.

Terry presented an opportunity to break the bonds of probable cause. One way for the Supreme Court to uphold the detention and search of the suspects in *Terry* was to embrace for the first time[35] the position that not every search or seizure required probable cause, that something less would satisfy the Fourth Amendment if that something was reasonable.[36] The Court seized its chance and forever changed the face of the amendment.

The *Terry* Court might have avoided the reasonableness analysis and still upheld the stop and search. It might, for instance, have characterized the stop of the suspects in *Terry* as less than a "seizure" for Fourth Amendment purposes. Or it might have concluded that Officer McFadden's observations gave him probable cause to believe that the men he observed were about to

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appears to have reverted to the long-standing tradition, stated in *Rabinowitz*, that the two clauses of the fourth amendment stand on equal footing, and that election between them lies in the province of investigating officers." *Id.* at 264.

33. 392 U.S. 1 (1968).

34. Professor Jerold Israel suggests that *Terry* may have marked a change in the Warren Court's view of the exclusionary rule and how the rule implements society's views of law enforcement. *See* Israel, *supra* note 7, at 1346-47. The upshot of his observation seems to be that, had Earl Warren remained in office, the Court would have taken much the same prosecution-oriented path that it took under Warren Burger.

35. *Terry v. Ohio* was not literally the first time the Supreme Court had approved a seizure on less than probable cause. It had done so in border search cases, for example. But border searches are *sui generis*; their approval rests upon state sovereignty principles. *Terry* was the first instance in which the Court approved a nonconsensual search for evidence of "street crime" without requiring probable cause or some substitute for it.

36. For a discussion on the rise of reasonableness in Fourth Amendment adjudication, including the significance of *Terry v. Ohio* in the history of the amendment, see Gerald S. Reamey, *When 'Special Needs' Meet Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295, 300-05 (1992).

commit an armed robbery. Instead, the Court deliberately chose to invoke reasonableness as the justification for the stop and frisk, admitting that the officer had less than probable cause and that the brief detention was a "seizure."[37] In retrospect, this more expansive, conceptual change seems entirely consistent with the Warren Court's approach to decision making, even if the result was decidedly prosecution-oriented.[38]

The Supreme Court's determination of what is "reasonable" in a given situation necessarily involves a largely subjective determination based on the facts revealed by a trial transcript. To avoid the appearance that this determination is as ad hoc and subjective as it might be, the Court from the beginning discussed reasonableness in coldly analytical, almost scientific terms.[39] The qualitative analysis of reasonableness was said to turn on a careful balancing of the privacy interests of the individual in a given situation against the law enforcement interests of society.[40]

This pseudoscientific cost-benefit paradigm helped first the Warren Court, then the Burger Court, and now the Rehnquist Court, to take a much freer hand in shaping the contours of the Fourth Amendment. The advantages of this approach are several, and they are important. First, the Court is able to give full weight to the complexities of search and seizure issues, to consider the "myriad daily situations in which policemen and citizens confront each other on the street."[41] If something less than probable cause and a warrant is constitutionally acceptable, the analytical formula used to determine acceptability must be able to account for variable levels of suspicion as well as a whole range of competing interests in requiring prior judicial approval.[42] When Chief Justice Warren wrote in *Terry* that "[e]ach case of this sort will, of course, have to be decided on its own facts,"[43] he merely acknowledged the range of inquiry required to implement a more sophisticated "sliding scale" approach to decision making.[44] If reasonableness analysis accommodates these variables, it better deals with reality than by trying to judge every situation by the less flexible probable cause and warrant formula. It also potentially removes the temptation to modify definitions or create more exceptions to the general rule.[45]

37. *See* Terry v. Ohio, 392 U.S. 1, 7-8, 16-19 (1968).

38. *See* Kamisar, *supra* note 7, at 64.

39. *See* Reamey, *supra* note 36, at 301-02. (balancing connotes objectivity and suggests scientific approach); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 429 (1988) (balancing requires normative judgments despite efforts to give them scientific or mathematical thrust).

40. *See* Terry v. Ohio, 392 U.S. 1, 26-27 (1968).

41. *Id.* at 12 (1968).

42. Logically, the Supreme Court should even be willing to deny permission to search in some cases in which probable cause exists. *See* Wasserstrom, *supra* note 15, at 310.

43. Terry v. Ohio, 392 U.S. 1, 30 (1968).

44. *Terry* is significant in that it signalled the Court's willingness to adopt a "sliding scale" to determine reasonableness. *See* Wasserstrom, *supra* note 15, at 309 (*Terry* can be read as a move toward a sliding scale approach).

45. Camara v. Municipal Court, 387 U.S. 523 (1967), is just one example of tailoring the definition of probable cause to fit the problem. *Camara* presented the issue of whether traditional

Moreover, a context-based reasonableness analysis lends persuasive force to Supreme Court holdings by expanding the decisional alternatives available to the Justices. Presumably, consensus would be more readily found for outcomes, although pluralistic opinions would likely also result. Professor Alschuler described the dilemma of having only a narrow range of judicial options when he wrote:

> A court's central obligation is to provide fair straightforward judicial interpretations of the law and principled resolutions of disputes. Litigants and the larger audience of bystanders are entitled to honest and coherent statements of reasons. When a court must choose either to abandon a prior ruling or to limit this ruling in a way that makes the law an ass, the time usually has come for abandonment.[46]

Adopting a reasonableness model opens immeasurably the decision making possibilities. It allows a court to begin finely sculpting the law instead of chiseling only rough features. It is also easier for a court to avoid making the law an ass without abandoning a prior ruling.

Unfortunately, for all of the benefits to be gained by sophisticated, narrowly focused adjudication, the method also contains the potential to do great harm. Used unwisely or inexpertly, or with bad motive, the search for reasonableness can undermine public confidence in decision making; obscure, ignore, or chip away at sound principles; and promote unprincipled activism.

Public confidence in decisions made by the Supreme Court is probably not eroded by small "course corrections"; indeed, it may be enhanced.[47] However, if a court reaches the same result time and again after purporting to engage in complex analysis, the public eventually perceives that something is amiss.[48] The public may not disagree with the results reached; it may even

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probable cause and a search warrant were necessary to conduct an administrative search for building code violations. The Supreme Court held firmly to its position that probable cause and a warrant were required, but modified the definition of probable cause to eliminate the need for individualized suspicion in certain code enforcement searches. *Id.* at 534-36. A search warrant was required, but again, no individualized suspicion was required. Justice White, writing in *Camara*, hinted at the incipient ascent of reasonableness:

> The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy.

Id. at 539 (citations omitted).

46. Alschuler, *supra* note 13, at 1452.

47. *See id.* at 1453-54.

48. As Professor Alschuler noted, "The open disapproval of past precedents might in fact

applaud the decisions. But like the fans of a football team that won because the refereeing was consistently in favor of the winners, the victory is a hollow one.[49]

Prolonged examination of the kinds of facts required in reasonableness analysis also affects the public's perception of the process in another way. A court consumed with detail, balancing first one set of facts and then another to decide whether the Fourth Amendment is offended, appears more like a system operator than a system engineer.[50] Such a tribunal seems disinterested in the principles of the Constitution, and engaged instead in the day-to-day processing of cases.[51] The purpose of the Fourth Amendment is eventually forgotten completely in this mechanical weighing of facts,[52] and even members of the Supreme Court may find it harder to remember the shape of the forest.

A decline in interest in principles may also be accompanied by an increase in interest in results, but it is probably impossible to tell which causes the other. A court with a clear idea of the outcomes it believes to be correct must be tempted by processes that relieve it from the burden of explaining in each case how that outcome is dictated by the application of principles that are at odds with its goal. Reasonableness analysis is by nature more manipulable than even semirigid doctrine. The temptation to use it, and to use it often, as an engine for change must be great.[53] Conscientious balancing can be difficult work, but its ease relative to formulating a coherent philosophy may impel justices to prefer the former.

On a more practical level, decisions based on reasonableness fail to provide guidance for those most affected. Police officers, trial judges, attorneys, and others engaged in the application of Fourth Amendment doctrine are hard

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undermine the Court's position in American life less than the repeated invocation of disingenuous distinctions." Alschuler, *supra* note 13, at 1453-54.

49. Needless to say, the fans also have little respect for the game officials.

50. *See* Israel, *supra* note 7. "Opinions that openly balance interests on both sides and rely upon multifaceted standards do not "glorify" individual rights or even boldly call to the public attention major civil liberties issues." *Id.* at 1423.

51. Professor Alschuler observed in this regard:

> Many Americans appear to have rejected the notion that law can be more than a flexible device for solving human problems. Some in fact have maintained that even the pragmatic vision of law claims too much. Law is a matter of who gets what, and rights are the bones over which people fight. Cost-benefit analysis and rule skepticism have eclipsed the notion of principles which can assure members of a society that they participate in a common civilization and that they play by the same rules.

Alschuler, *supra* note 13, at 1454.

52. *But see* Nadine Strossen, Michigan Department of State Police v. Sitz: *A Roadblock to Meaningful Enforcement of Constitutional Rights*, 42 HASTING L.J. 285, 362 (1991) (reasonableness does not necessarily imply low level of judicial review).

53. There is reason to believe the Burger court succumbed to this temptation. *See* Blasi, *supra* note 8, at 199-208; Friedman, *supra* note 12 (Chief Justice not a "practitioner of 'judicial restraint'").

pressed to predict what is "reasonable" and what is not.[54] Of course, predictability can be gained if the court is clear about how it values competing interests and discloses which facts are outcome determinative, and why.[55] Otherwise, results are predictable only if the Court is willing to consistently reach the same result.[56]

Some of the flaws in reasonableness analysis are inherent. Any court employing this mode of adjudication is likely, for example, to fail to provide sufficient justification for its opinions to overcome a deficiency in predictability. However, many of the potential process disadvantages can be avoided. In assessing the work of the Burger Court, it is revealing to survey how the Court used and developed reasonableness as an analytical model in search and seizure cases.

While the "Burger Court," or at least the Supreme Court including Warren Burger, did not decide *Terry v. Ohio*,[57] the reasonableness doctrine was certainly cultivated and expanded during the years in which Warren Burger was Chief Justice. There are three ways in which the Court employed reasonableness to judge (or not judge) Fourth Amendment cases: (1) as a way to review searches substantively; (2) as a way to define "search"; and (3) as a procedural screening device.

The "Substantive" Use of Reasonableness

The "substantive" use of reasonableness is illustrated by *Terry v. Ohio* and its progeny, of which there are now many. Following the decision in *Terry*, numerous balancing cases were decided in "quasi-search" situations, most of which involved administrative or regulatory inspections or searches not directly aimed at the detection of criminal evidence.

Chief Justice Burger himself wrote the seminal decision in one of these cases, *South Dakota v. Opperman*.[58] *Opperman* permitted police to impound an automobile and inventory its contents without probable cause or a warrant because the procedure was not "unreasonable."[59] In reaching this result, the

54. *See* Wasserstrom & Seidman, *supra* note 30, at 48 ("individualized, retrospective balancing provides little prospective direction to police officers, who presumably need clear rules to guide their decisions"); *cf.* Gerald G. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy,"* 34 VAND. L. REV. 1289, 1310 (1981). (Court's primary formulation leaves police and courts without standards to guide their conduct).

55. Unfortunately, this is rarely done. *See* T. Alexander Aleinkoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 976 (1987).

56. *See* Reamey, *supra* note 36, at 328 (always reaching the same result completely abdicates the judicial role in "deciding" cases).

57. 392 U.S. 1 (1968).

58. 428 U.S. 364 (1976). *Opperman* was the first true automobile inventory case. The Supreme Court laid the groundwork for inventory in Cady v. Dombrowski, 413 U.S. 433 (1973). It was not until *Opperman* was decided that the ideas swirling through the *Dombrowski* opinion gelled into a new and identifiable probable cause and warrant exception. The approach of *Opperman* in permitting a warrantless search without probable cause was, however, a considerable departure from the typical Warren Court search decision. *See* Israel, *supra* note 7, at 1396-97.

59. *See Opperman*, 428 U.S. at 376.

Chief Justice balanced the government's interest in safety, protection of the owner's property, and shielding police from false claims of theft or loss against the automobile owner's privacy interest in the vehicle's contents.[60] Without disputing that the procedure was a search,[61] the Court held it reasonable so long as the inventorying agency followed standardized procedures,[62] did not have an investigative motive,[63] and had lawfully impounded the vehicle.[64] The search of the car's unlocked glove compartment was considered to be within the permissible scope of the valid inventory,[65] but the vehicle inventory scope issue was not explored seriously until the Supreme Court decided *Colorado v. Bertine*[66] in 1987.

The Chief Justice wrote for the majority again in a personal effects inventory case, *Illinois v. Lafayette*.[67] This time it was the defendant's shoulder bag that was inventoried after he was arrested, but the analysis and the result were the same as in *Opperman*. The arrestee's privacy interests in the bag were outweighed by the government's interests in discovering its contents; therefore, the inventory was reasonable.[68]

Other lines of cases adopting the reasonableness analysis were decided by the Burger Court as well. They, too, dealt with administrative and regulatory inspections in a wide variety of settings. In each instance, interests were balanced, but always with the same result.

In the same year *Opperman* was decided, the Supreme Court, not surprisingly, found it reasonable to search persons at the international border, even if no individualized suspicion exists.[69] Several years later, the Court moved beyond the border and inventory cases to apply the reasonableness standard in evaluating the search of a school student.[70]

60. *See id.* at 369. The validity of these governmental "interests" is crucial in balancing persuasively, but the majority opinion in *Opperman* does not contain any serious justification for any of them. *See* Gerald S. Reamey, *Reevaluating the Vehicle Inventory*, 19 CRIM. L. BULL. 325, 334-35 (1983).

61. *See Opperman*, 428 U.S. at 371 n.6.

62. *Id.* at 374-76.

63. *Id.* at 376; *see* Larry W. Yackle, *The Burger Court and the Fourth Amendment*, 26 KAN. L. REV. 335, 409 (1978) (Burger found warrant requirement unhelpful in "noncriminal" case of vehicle inventory).

64. *Opperman*, 428 U.S. at 368-69, 375.

65. *Id.* at 376 n.10.

66. 479 U.S. 367 (1987). Interestingly, when the Court did consider scope, it went through the motions of balancing to adopt what amounted to a "bright-line rule" that the inventory of unlocked containers within the passenger compartment of a vehicle is *per se* reasonable. *See* Gerald S. Reamey et al., *The Permissible Scope of Texas Automobile Inventory Searches in the Aftermath of* Colorado v. Bertine*: A Talisman is Created*, 18 TEX. TECH L. REV. 1165, 1171-72 (1987).

67. 462 U.S. 640 (1983).

68. *See id.* at 647. In *Colorado v. Bertine*, then Chief Justice Rehnquist said of *Lafayette*: "In deciding whether this search was reasonable, we recognized that the search served legitimate governmental interests similar to those identified in *Opperman*. We determined that those interests outweighed the individual's Fourth Amendment interests and upheld the search." *Bertine*, 479 U.S. at 372.

69. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976).

70. *See* New Jersey v. T.L.O., 469 U.S. 325, 326 (1985).

The Court's decision in *New Jersey v. T.L.O.*[71] smuggled into Fourth Amendment jurisprudence a new, and eventually talismanic, phrase: "special needs."[72] Justice Blackmun, concurring in the Court's holding that the warrantless search of T.L.O.'s purse required no more than reasonable suspicion, invoked the phrase in an apparent attempt to limit the use of balancing as a way to circumvent the traditional Fourth Amendment requirements: "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable is a court entitled to substitute its balancing of interests for that of the Framers."[73]

A series of "special needs" cases grew from this beginning as the Supreme Court repeatedly balanced away probable cause and the warrant requirement in cases involving probationers,[74] automobile salvage dealers,[75] government workers,[76] railway employees,[77] and customs agents.[78] Today, even individualized suspicion is a dispensable component in cases of special need.[79] Justice Blackmun never intended this use of his invention.[80] He would have limited balancing to those cases in which "the practical realities of a particular situation suggest that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute."[81]

The most striking feature of the cases in which the Court has balanced interests to decide reasonableness is the consistency of the results.[82] To date, in the special needs cases the Supreme Court has invariably found individual privacy rights to be of less weight, has always required less suspicion than probable cause, has never imposed a warrant requirement, and has always upheld the search that uncovered the damaging evidence.[83] As Justice Marshall observed:

> In the four years since this Court, in *T.L.O.*, first began recognizing "special needs" exceptions to the Fourth Amendment, the clarity of Fourth Amendment doctrine has been badly distorted, as the Court has eclipsed the probable-cause requirement in a patchwork quilt of settings: public school principals' searches of

71. 469 U.S. 325 (1985).

72. *See* Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 25 (1991) ("special needs" first appeared in New Jersey v. T.L.O., 469 U.S. 325 (1985)).

73. New Jersey v. T.L.O., 469 U.S. 325, 351 (Blackmun, J., concurring).

74. *See* Griffin v. Wisconsin, 483 U.S. 868 (1987).

75. *See* New York v. Burger, 482 U.S. 691 (1987).

76. *See* O'Connor v. Ortega, 480 U.S. 709 (1987).

77. *See* Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989).

78. *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

79. *See, e.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 444 (1990); Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 640 (1989) (Marshall, J. dissenting); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 (1989).

80. *See* O'Connor v. Ortega, 480 U.S. 709, 732-48 (1987) (Blackmun, J., dissenting).

81. *Id.* at 741 (Blackmun J., dissenting).

82. *See* Reamey, *supra* note 36, at 320-21.

83. *See id.* at 320.

> students' belongings; public employers' searches of employees' desks; and probation officers' searches of probationers' homes. Tellingly, each time the Court has found that "special needs" counseled ignoring the literal requirements of the Fourth Amendment for such full-scale searches in favor of a formless and unguided "reasonableness" balancing inquiry, it has concluded that the search in question satisfied that test.[84]

The "substantive" application of reasonableness developed by the Burger Court has, therefore, not resulted in the kind of sophisticated, context-based antiformalism that it might have. Because it has been used to produce the same result over and over, it has obscured[85] rather than clarified the meaning of the Fourth Amendment.[86] As Justice Marshall noted of these cases, "Without the content which those [warrant and probable cause] provisions give to the Fourth Amendment's overarching command that searches and seizures be 'reasonable,' the Amendment lies virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give to that supple term."[87]

Justice Marshall's observation reflects another concern raised by the consistent use of reasonableness to uphold searches. That concern is that the Supreme Court freely disregards the strictures of the Fourth Amendment when it is expedient to aid law enforcement. Case-by-case analysis of the sort required to determine reasonableness promotes an uneven weighing of interests when social and political pressures can be alleviated by doing so.[88] Because reasonableness is a vague concept anyway, using it to adjudicate search and seizure cases adds neither clarity to the amendment's mandate, nor confidence that the mandate is being taken very seriously by the Supreme Court.[89]

The use of reasonableness to dilute the Fourth Amendment did not begin with the Burger Court,[90] and it has not ended with the Burger Court. Nevertheless, it is the Burger Court that had the opportunity to decide

84. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 639 (1989) (Marshall, J., dissenting) (citation omitted).

85. *See* John M. Burkoff, *The Court that Devoured The Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151, 168 (1979) (Burger Court's propensity to "balance away" Fourth Amendment rights has been appropriately criticized).

86. *See id.* It has, on the other hand, produced predictability of result.

87. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 637 (1989) (Marshall, J., dissenting) (citation omitted).

88. *See* Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 909 (1987) (when the Supreme Court balances collective interest in law enforcement against personal liberty and due process, privacy loses out).

89. *See* Israel, *supra* note 7, at 1423 (balancing opinions do not glorify individual rights or call to the public attention major civil liberties issues); Wasserstrom & Seidman, *supra* note 30, at 48 ("[B]alancing tests are notoriously manipulable. For the very reason that they do not provide bright lines, they are subject to slippage when the Court is under political pressure to crack down on criminals.").

90. *See* Israel, *supra* note 7, at 1346-47 (*Terry* may have signalled shift of Warren Court back toward mainstream community consensus).

whether and how reasonableness would continue to be used, and its decisions reflect very few missed opportunities to use it against those persons accused of crime.[91]

The Use of Reasonableness to Define "Search"

The second way in which the Burger Court used reasonableness analysis was to define a "search." Here again, it was the Warren Court, and not the Burger Court, that introduced reasonableness into the definition just a year and a half before Warren Burger became Chief Justice.

Abandoning the formalistic concept that the Fourth Amendment protected only certain defined places, the Warren Court decided *Katz v. United States*[92] in 1967. The petitioner in *Katz* had been convicted of transmitting betting information by telephone across state lines.[93] Evidence used against the petitioner at trial included his own end of the conversation overheard by the use of a listening device placed on the outside of the telephone booth.[94] Prior to the decision in *Katz*, the definition of "search" was closely tied to property concepts; a search occurred only if the government intruded into a "protected" area.[95] The Supreme Court held for the first time in *Katz* that "the Fourth Amendment protects people, not places."[96]

Rejecting the argument that the outcome turned on whether a trespass had occurred, the Court explained that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth

91. *See* Stone, *supra* note 1. Professor Stone noted:

> If there is one area in which the Burger Court's decisions seem most clearly to reflect a self-conscious "agenda," it is in the realm of constitutional criminal procedure. In construing the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" and the privilege against compelled self-incrimination, the Court has hardly missed an opportunity to narrow the protections of these guarantees.
>
> The Burger Court has sided with the government in almost 75 percent of its decisions involving the rights of persons suspected of crime. And although the Court has not explicitly overruled the most important Warren Court precedents, it has severely limited their scope and undermined their effectiveness.

Id. at 12. Professor Leon Friedman noted the same trend, but attributed it directly to the Chief Justice:

> [Chief Justice Burger's] strongest defense of the community's rights over those of the individual is, of course, in criminal law. The chief rarely votes in favor of an accused. During the 1984-85 Term there were 31 full opinions in the criminal area and the chief voted against the government position in only seven.

Friedman, *supra* note 12, at 17.

92. 389 U.S. 347 (1967).

93. *Id.* at 348.

94. *Id.*

95. *See* Silverman v. United States, 365 U.S. 505 (1961); Goldman v. United States, 316 U.S. 129 (1943), *overruled by* Katz v. United States, 389 U.S. 347 (1967); Olmstead v. United States, 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

96. Katz v. United States, 389 U.S. 347, 351 (1967).

Amendment."[97] Justice Harlan's concurrence in *Katz* refined the opinion by introducing the requirement that the expectation of privacy be "reasonable."[98] Despite Justice Harlan's explanation that no search occurs unless a person's expectation of privacy is both subjectively held and one that society is prepared to accept as reasonable,[99] the rule is essentially objective.[100]

Reformulating the search definition in reasonableness terms accomplished several worthwhile goals. Most importantly, it repudiated the illogic of applying the Fourth Amendment only to protected places and persons within those places.[101] No longer was the Supreme Court required to limit its prior rulings in such ways as to "make the law an ass";[102] it was able instead to consider the reach of the Fourth Amendment in a more realistic, commonsense fashion.

Conceptualizing search and seizure more broadly permitted the Court to deal effectively with the infinitely variable situations coming before it, including those brought about by the advent of new and improved surveillance technologies. As was true of reasonableness analysis used substantively to decide the constitutional propriety of a search, using reasonableness to define "search" avoided rigid, sterile "bright-line" decision making. But as was also true, the adoption of reasonableness as a definitional test added to confusion rather than clarity about when the Fourth Amendment would apply.[103] This trade-off is succinctly described in a leading treatise on criminal procedure:

> *Katz* is an extremely important case even outside of electronic eavesdropping settings because it marks a movement toward a redefinition of the scope of the Fourth Amendment. This is not to say that it produced clarity where before there had been uncertainty, as the Court substituted for a workable tool that often proved unjust a new test which was difficult to apply.[104]

Of course, it is not always difficult to apply the *Katz* test. In the traditional "plain view" situation, it is easy to hold that a person has no reasonable expectation of privacy in the evidence of criminal activity he exposes to public view.

The harder cases are those in which a person has what appears to be a reasonable expectation of privacy in his activities but is discovered fortui-

97. *Id.* at 353.

98. *Id.* at 361 (Harlan, J., concurring).

99. *Id.*

100. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 98 (1985); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974); John M. Burkoff, *When Is a Search Not a "Search?" Fourth Amendment Doublethink*, 15 U. TOL. L. REV. 515, 527-28 (1984).

101. *See Katz*, 389 U.S. at 353 (meaning of "search and seizure" not controlled by law of trespass).

102. *See* Alschuler, *supra* note 13, at 1452.

103. *See* LAFAVE & ISRAEL, *supra* note 100, at 98.

104. *Id.*

tously or by the aid of enhanced senses.[105] The question in such cases seems to be whether the privacy expectation was "reasonable" in the first place, viewed in hindsight and with some regard for whether the conduct of the law enforcement agents was consistent with the goal sought to be achieved.[106] Chief Justice Burger wrote opinions for the majority in two of these hard cases in which the Supreme Court used "reasonable expectation of privacy" to find that no search occurred.

In the first of these, *Illinois v. Andreas*,[107] marijuana hidden within a wooden table leg was discovered by a customs inspector.[108] The table, which was in transit when the marijuana was discovered, was delivered to the addressee by law enforcement officers posing as delivery men.[109] Once the addressee had assumed control of the table and the marijuana concealed within it, he was arrested and the table leg reopened without a warrant.[110]

The Chief Justice noted first that the original discovery of the drugs was lawful because customs officers have the "undoubted right to inspect all incoming goods at a port of entry."[111] Having done so,

> no protected privacy interest remains in contraband in a container once government officers lawfully have opened that container and identified its contents as illegal. The simple act of resealing the container to enable the police to make a controlled delivery does not operate to revive or restore the lawfully invaded privacy rights.[112]

Perhaps the most troubling aspect of the *Andreas* search was that the surveillance of the table was not continuous.[113] Once the container entered the defendant's apartment, it was out of sight of the undercover officer.[114] This gap in surveillance was viewed by Chief Justice Burger as constitutionally inconsequential because "perfect" controlled deliveries are virtually impossible to achieve.[115] Imperfect controlled deliveries are therefore acceptable unless a "substantial likelihood" exists that the contents of the container

105. *See id.* at 99-101.

106. Professor Amsterdam summarized the difficulty in applying *Katz* by describing the issue as "a value judgment . . . [namely,] whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." Amsterdam, *supra* note 100, at 403.

107. 463 U.S. 765 (1983).

108. *Id.* at 767.

109. *Id.*

110. *Id.* at 767-68. The agents were in the process of obtaining a search warrant when the defendant left his apartment with the container. *Id.* at 767. He was arrested immediately, and no warrant was ever procured. *Id.* at 767-68.

111. *Id.* at 769 n.1. The container and table were inspected in Chicago, arriving by air from Calcutta. *Id.* at 767.

112. *Id.* at 771.

113. *See id.* at 767 (container out of sight of officers for between 30 and 45 minutes).

114. *Id.*

115. *See id.* at 772.

have been changed.[116] In fashioning this "substantial likelihood" standard, the Chief Justice called upon three "Fourth Amendment principles":[117] (1) the standard must be "workable," "reasonable," and "objective."[118] (In common parlance, this meant that police officers should be able to understand the standard (i.e., it should be a "bright-line"));[119] (2) the court should not find a privacy expectation where it would be "absurd" to do so;[120] and (3) the subjective belief of the individual police officer is unimportant.[121]

All of these "principles"[122] can, of course, be easily applied to deny Fourth Amendment protection to a citizen. There will be considerable disagreement about what is "workable for application by rank-and-file, trained police officers."[123] Determining whether a "substantial likelihood" exists that contents of a container have changed during the time it is outside the view of a police officer hardly seems susceptible to a bright-line rule. Increasing the standard's rigidity would make it more "workable" for law enforcement, but it might also tempt a crime-control court to increase the length of the acceptable "surveillance gap" to accommodate the needs of law enforcement. Contrary to the assertion by the Chief Justice that "it would be absurd to recognize as legitimate an expectation of privacy where there is only a minimal probability that the contents of a particular container had been changed,"[124] a Supreme Court determined to conscientiously balance interests should be prepared to find that at least some brief "surveillance gaps" do revive privacy expectations. What is "absurd" to one court might be "reasonable" to another.[125] And, complete rejection of the subjective views of the officer can be another way of saying that the Court will not permit the conclusions of those on the scene to interfere with its own judgment about how the case should turn out.[126] Chief Justice Burger not only found no "search" in

116. *See id.* at 773. It has been argued that this formulation goes much farther than necessary to reach the decision. *See* Wasserstrom, *supra* note 15, at 382-85.

117. *See Andreas*, 463 U.S. at 772.

118. *See id.* at 772-73.

119. *See id.* at 772.

120. *See id.* at 773.

121. *Id.*; *see also* Wasserstrom, *supra* note 15, at 381-87 (explaining and analyzing components of "substantial likelihood.")

122. It is unclear why these tenets of construction should be considered "Fourth Amendment principles." Of the three, only reasonableness is specifically included within the amendment's language, and it is a general principle that does not necessarily require that standards be either "workable" or "objective.

123. *Andreas*, 463 U.S. at 772; *see also id.* at 781 (Brennan, J., dissenting).

124. *Id.* at 773.

125. In other words, the objective "reasonableness" standard articulated by Chief Justice Burger sounds suspiciously like a subjective standard instead. It is interesting that the Chief Justice consistently referred in Illinois v. Andreas, 463 U.S. 765 (1983) to the expectation of privacy as "legitimate" rather than "reasonable." *See* Wasserstrom, *supra* note 15, at 386-87. "Legitimate," like "absurd," connotes a value judgment inconsistent with reasonableness. *Id.*

126. Presumably, the Chief Justice intended that the Court would not be controlled by an officer's subjective view that the surveillance gap was inconsequential. But apparently the Court would also not consider itself bound by an officer's subjective view that the gap was sufficient to make it very possible that the evidence has been moved.

Andreas, but also gratuitously erected a substantial barrier to future defendants in other cases claiming that their privacy expectations might eventually become reasonable again.[127]

This inability or unwillingness to appreciate how citizens might "reasonably" view their own privacy is reflected in the other "no search" opinion authored by the Chief Justice. The defendant in *California v. Ciraolo*[128] was also found in possession of marijuana, but the method of discovery was completely unlike that in *Andreas*. Police received an anonymous tip that Ciraolo was growing marijuana in his backyard.[129] Because the backyard was double-fenced, the officers, and any passersby, were unable to see into it.[130] One of the officers assigned to investigate flew over the house in a private plane at an altitude of 1000 feet, within navigable airspace.[131] From the air, he observed marijuana plants growing in the backyard. A search warrant was obtained, based on the observations and photographs made during the flight, and the plants were seized.[132]

Because the plants were growing within the "curtilage" of the residence, the "open fields" doctrine did not protect the activity from the requirements of the Fourth Amendment.[133] However, Chief Justice Burger concluded that

> [a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.[134]

In effect, the observation was not a search at all.[135] This must have come as a considerable shock to Mr. Ciraolo since the Court conceded that the sole purpose of the flight was to peer into his backyard to gather evidence of criminal activity.[136] Moreover, the Court noted that the defendant had

127. As Professor Wasserstrom noted:

> [T]he Court 's analysis in *Andreas* suggests that once information about a person has been revealed through lawful surveillance, then he no longer has a protectable privacy interest in preventing repeated observations that would reveal no new information. Thus, for example, on the reasoning of *Andreas*, it would seem that if an undercover agent lawfully entered a person's house, and observed what was within it, then other agents could observe the interior of the home without invading a protectable privacy interest.

Wasserstrom, *supra* note 15, at 385.

128. 476 U.S. 207 (1986).

129. *Id.* at 209.

130. *Id.*

131. *Id.*

132. *Id.* at 209-10.

133. *Id.* at 213.

134. *Id.* at 213-14.

135. The Chief Justice explained: "In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet." *Id.* at 215.

136. Chief Justice Burger summarily dismissed the argument that the advertence of the view

gone to some lengths to protect his yard from observation, and that the means were effective.[137]

While "[a]ny member of the public flying in this airspace who glanced down *could* have seen [the marijuana],"[138] the significant point in *Ciraolo* was that the view was not inadvertent. To the contrary, it was the sole reason for the flight. As Justice Powell noted in dissent, "Since Officer Shutz could not see into this private family area from the street, the Court certainly would agree that he would have conducted an unreasonable search had he climbed over the fence, or used a ladder to peer into the yard without first securing a warrant."[139] If Justice Powell was right in this assumption, how is a view from an airplane constitutionally distinguishable?[140]

Phrasing the issue in terms of whether an airplane or a ladder was used to obtain a view makes the distinction appear ridiculous, as no doubt it was intended. But it also uncovers a serious problem inherent in the reasonableness analysis. If Chief Justice Burger found Ciraolo's privacy expectation patently unreasonable, others, including four members of the Supreme Court, would not.[141] As Justice Powell observed, passengers on commercial flights "normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass."[142] The Chief Justice displayed so little sympathy for the dissent's view that one wonders whether he was still more concerned with the legitimacy of the defendant's privacy expectation, and not whether it was objectively reasonable.[143]

The decisions in *Andreas* and *Ciraolo*, as well as the other cases in which the Burger Court refused to believe that a person's expectation of privacy was reasonable (or legitimate),[144] illustrate the relative ease with which this

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made a difference: "That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant." *Id.* at 213.

137. The California Court of Appeals held that the two fences and their configuration were "objective criteria from which we may conclude he manifested a reasonable expectation of privacy by any standard." People v. Ciraolo, 208 Cal. Rptr. 93, 97 (Cal. Ct. App. 1984), *rev'd*, 476 U.S. 207 (1986). The Chief Justice agreed that "[c]learly — and understandably — respondent has met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits." California v. Ciraolo, 476 U.S. 207, 211 (1986).

138. *Ciraolo*, 476 U.S. at 213-14 (emphasis added).

139. *Id.* at 222 (Powell, J., dissenting).

140. Justice Powell concluded that it must be the *manner* of surveillance that distinguished the cases for the majority. *See id.* at 222-23 (Powell, J., dissenting).

141. *See id.* at 223-25 (Powell, J., dissenting) (defendant's privacy expectation was reasonable). The California Court of Appeals agreed with the dissenters. *See* People v. Ciraolo, 208 Cal. Rptr. 93, 97-98 (Cal. Ct. App. 1984), *rev'd*, 476 U.S. 207 (1986). The views of the Supreme Court justices are discussed in BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION 351-52 (1990).

142. *Ciraolo*, 476 U.S. at 223 (Powell, J., dissenting).

143. *See* Wasserstrom, *supra* note 15, at 386 (use of "legitimate" expectation of privacy standard both unilluminating and dangerous). Professor Wasserstrom asks rhetorically, "[H]ow can a criminal have a *legitimate* expectation of privacy when he has concealed contraband or evidence of crime?" *Id.* (emphasis in original).

144. One of the most important of these was United States v. Knotts, 460 U.S. 276 (1983). In

flexible standard can be used to avoid the traditional strictures of the Fourth Amendment. The addition of reasonableness to the definition of "search" provided the court an effective tool with which to fight crime, or at least the reversal of convictions.[145]

Reasonableness as a Procedural Barrier to Adjudication

The third reasonableness analysis the Burger Court developed to deny vindication of Fourth Amendment rights violations was a procedural one: standing. Unlike the other uses to which reasonableness was put, its application in determining whether a defendant had standing to bring a Fourth Amendment claim was the creation of the Burger Court.[146]

The Court inherited from the Warren Court a "bright-line" rule for determining whether the accused could invoke the exclusionary rule.[147] In

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Knotts, government agents placed a radio transmitter in a container of a "precursor" chemical to enable them to track the chemical to the place where it would be used. *Id.* at 277. As in *Ciraolo*, an airplane was used to visually and electronically track the progress and route of the car into which the chemical was loaded. *Knotts*, 460 U.S. at 278-79. The beeper was tracked visually at first, but police discontinued visual surveillance when suspects began evasive moves. Police located the beeper again by electronic monitoring from a helicopter. *Id.* The container was eventually found in a secluded cabin. A search warrant was obtained for the cabin, and a drug laboratory was discovered in the ensuing search. *Id.* The Supreme Court held that the use of the "beeper" was not a search. *Id.* at 285. The defendant had no legitimate expectation of privacy in the container when the transmitter was placed inside, nor did he have any legitimate expectation of privacy in his movements on public roads, even if those movements were followed by electronic means. *Id.* at 282-85; *see* Arnold H. Lowey, *Protecting Citizens from Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term*, 62 N.C. L. REV. 329, 352-53 (1984); Wasserstrom, *supra* note 15, at 375-79.

Knotts left unanswered the question of whether electronic aid in gathering information about a protected, private area is a search. The Supreme Court held that it is in United States v. Karo, 468 U.S. 705 (1984).

In Smith v. Maryland, 442 U.S. 735 (1979), the Court upheld the surreptitious use of "pen registers" on the grounds that persons have no reasonable expectation of privacy in the telephone numbers dialed from their own phones. *Id.* at 741-46. The Court also found no reasonable expectation of privacy in odors emanating from a person's property. United States v. Place, 462 U.S. 696 (1983). For insight into the politics of the Court on the beeper cases, see SCHWARTZ, *supra* note 141, at 349-50.

145. Regarding the electronic surveillance cases, Professor John Burkoff wrote:

> For my own part, I honestly do not know which is worse: (1) to conclude that the Court has utilized doublethink in ruling that the expectation of government electronic interception is official "reality," i.e., they know that that is not "really" true but it's the result-oriented way they are deciding fourth amendment cases in order to catch criminals, or, (2) to conclude that a majority of the Supreme Court — our bastion of last resort in the protection of constitutional liberties — honestly believe that the assumption that the government is not permitted to monitor our conversations is so unreasonably naive as to be unworthy of constitutional protection.

Burkoff, *supra* note 100, at 541.

146. Specifically, the major standing opinions were authored by then Associate Justice Rehnquist.

147. *See* Jones v. United States, 362 U.S. 257 (1960). Justice White later characterized the rule of *Jones* as one "relatively easily applied." Rakas v. Illinois, 439 U.S. 128, 168 (1978) (White, J., dissenting).

Jones v. United States,[148] the Warren Court considered the dilemma of the defendant charged with possession of illegal drugs. Such a defendant could establish his "standing" to contest the search for and seizure of those drugs by claiming that he owned them or had some possessory interest in them, but to do so would simultaneously establish the key element of the government's case.[149] In order to avoid placing the defendant in this procedurally untenable position, the Court erected an "automatic" standing rule: If the defendant was charged with a possessory offense, he was automatically entitled to contest the manner in which the evidence had been recovered.[150] Another way for the accused to establish standing was to prove that he had been "legitimately on the premises,"[151] assuming that he had no possessory interest in the premises. While this alternative was less "bright-line" than the automatic standing rule in possession cases,[152] it too tended toward inclusion rather than exclusion.[153]

The purpose of the "automatic standing" component of *Jones* was undercut by *Simmons v. United States*,[154] decided just a year before Warren Burger became Chief Justice. In *Simmons*, the Court resolved the standing dilemma faced by the accused charged with a nonpossessory crime: whether to testify (and thereby waive his Fifth Amendment privilege) at a suppression hearing in order to establish standing, or to forego testifying (and thereby waive vindication of his Fourth Amendment rights).[155] The accused would not be required to choose between his rights; his testimony at the suppression hearing was simply held inadmissible against him at trial.[156]

The logical upshot of *Simmons* was that automatic standing was no longer required for possessory offenses. If the accused's testimony was unavailable to the prosecution, he could freely assert the facts necessary to establish his standing. In *United States v. Salvucci*,[157] based on just that reasoning, the Burger Court abandoned automatic standing.[158]

"Legitimately on premises" was also replaced by the Burger Court in *Rakas v. Illinois*.[159] Justice Rehnquist, writing for the Court, explained that

148. 362 U.S. 257 (1960).

149. *See id.* at 261-62.

150. *See id.* at 264-65.

151. Justice Frankfurter wrote: "No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress. . . ." *Id.* at 267.

152. "Legitimately on premises" was eventually abandoned with the assertion that "[w]e are rejecting blind adherence to a phrase which at most has superficial clarity and which conceals underneath that thin veneer all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment." Rakas v. Illinois, 439 U.S. 128, 147 (1978).

153. This feature of the rule was seen as a disadvantage by Justice Rehnquist, writing for the majority in *Rakas*. *Id.* at 142 ("[W]e believe that the phrase 'legitimately on premises' coined in *Jones* creates too broad a gauge for measurement of Fourth Amendment rights.").

154. 390 U.S. 377 (1968).

155. *Id.* at 394.

156. *Id.*

157. 448 U.S. 83 (1980).

158. *Id.* at 89-90, 95.

159. 439 U.S. 128 (1978).

the rule swept too broadly, permitting even casual visitors to invoke the exclusionary rule for searches of premises in which they had no legitimate expectation of privacy.[160] Borrowing from the reasoning of *Katz*, Justice Rehnquist reiterated that Fourth Amendment rights are personal and cannot be asserted vicariously.[161] However, not everyone at whom a search was "directed" could complain.[162]

Only those persons who enjoyed a reasonable expectation of privacy in the place to be searched could challenge the constitutionality of that search.[163] Thus, the passengers in a vehicle could not contest a police search of the glove compartment unless they had some personal and reasonable privacy expectation in its contents.[164] This expectation might be reasonable because they owned or possessed the vehicle, and presumably it might be reasonable under some circumstances even if they did not.[165]

It seemed after *Rakas* that the Court was moving away from a formalistic approach to standing and toward one that was somewhat more restrictive, but that also potentially extended standing to persons without regard to their property rights. However, two years later in *Rawlings v. Kentucky*,[166] it became clear that "reasonable expectation of privacy" would be used to constrict the right of defendants to challenge searches and seizures. David Rawlings had placed his drugs in the purse of his female companion.[167] They were discovered by police during a search he claimed violated the Fourth Amendment.[168] The Supreme Court, in another opinion authored by Justice Rehnquist, denied standing to Rawlings on the grounds that he had no legitimate expectation of privacy in the contents of the purse, even though he claimed ownership of the drugs.[169]

Under *Jones*, Rawlings would undoubtedly have been able to litigate the search issue,[170] either because it was a possessory offense giving him automatic

160. *Id.* at 142.

161. *See id.* at 133-34; *see also* Alderman v. United States, 394 U.S. 165, 174 (1969) (Fourth Amendment rights are personal).

162. The Court rejected a "target" theory that would have granted standing to all persons who were the target of a search. *See Rakas*, 439 U.S. at 132-33.

163. Justice Powell, joined in his concurrence by the Chief Justice, explained:

> The ultimate question, therefore, is whether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances. As the dissenting opinion states, this standard "will not provide law enforcement officials with a bright line between the protected and the unprotected." Whatever the application of this standard may lack in ready administration, it is more faithful to the purposes of the Fourth Amendment than a test focusing solely or primarily on whether the defendant was legitimately present during the search.

Id. at 152 (Powell, J., concurring) (citation omitted).

164. *See id.* at 148.

165. Justice Rehnquist emphatically denied that a property interest was necessary to establish standing. *Id.* at 149-50 n.17.

166. 448 U.S. 98 (1980).

167. *Id.* at 101.

168. *Id.* at 103.

169. *Id.* at 104-06.

170. Justice Rehnquist conceded, "Prior to *Rakas*, petitioner might have been given 'standing' in such a case to challenge a 'search' that netted those drugs . . . ." *Id.* at 106.

standing, or because he had placed the drugs in the purse with the knowledge and perhaps the consent of the purse's owner.[171] Unfortunately for the defendant, on the same day the Court abandoned "legitimately on premises" in his case it also discarded "automatic standing" in *Salvucci*.[172] However, even before *Jones* was decided, a defendant with an ownership interest in property searched could object to a search of that property. Rawlings made just this claim,[173] but the Court rejected it, demonstrating how "reasonable expectation of privacy" could be used to narrow standing beyond the traditional pre-*Jones* formulation: "While petitioner's ownership of the drugs is undoubtedly one fact to be considered in this case, *Rakas* emphatically rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment."[174]

Once the Court explicated the extent of its new standing rule, the result in *Rawlings* was anticlimactic. Rawlings' expectation of privacy in the purse, if in fact he had one,[175] was unreasonable.[176] Among the reasons for this conclusion, the Court mentioned that the defendant had "never sought or received access to her purse prior to that sudden bailment"; that he had no right to exclude others from the purse; that in fact an acquaintance of the woman had looked through her purse on the morning of the arrest; and that "the precipitous nature of the transaction hardly supports a reasonable inference that petitioner took normal precautions to maintain his privacy."[177] One wonders just what precautions he might have taken short of clutching the purse in his own hands and refusing to let even its owner open it. Once again, the Burger Court had demonstrated its willingness and ability to use a reasonableness analysis to diminish the reach of the Fourth Amendment.[178]

Regardless of the way in which reasonableness was employed, the result was the same. Criminal defendants were denied the exclusionary sanction either because they could not bring a complaint, or because the Fourth Amendment did not apply to their situation, or, if it did apply, because the Fourth Amendment was satisfied by however little protection had been provided by law enforcement. The context-based, sophisticated analysis that should have produced differing results tailored to each new situation ultimately produced only one result: affirmance of convictions.[179]

171. It was unclear from the testimony whether the woman had actually consented to carry the drugs in her purse. *See id.* at 101-02 n.1.

172. *See id.* at 103 n.2.

173. *See id.* at 105.

174. *Id.* at 105.

175. *See id.* at 104 n.3 (Rawlings testified that he did not expect the drugs in the purse to be free from governmental intrusion).

176. *Id.* at 104.

177. *Id.* at 105.

178. *See* Burkoff, *supra* note 85, at 166-67 (result of Burger Court's standing cases is decreased access to Fourth Amendment); Kamisar, *supra* note 7, at 74 (standing barrier grew more formidable than ever under Burger Court).

179. It is certainly true that the phrase "reasonable expectation of privacy" can be found included in opinions in which a conviction was ultimately reversed, but the results in cases in which the decision turns on reasonableness itself are surprisingly uniform.

Bright-Line Rules: Formalism in Sheep's Clothing

Bright-line rules usually differ from reasonableness analysis in their ease of application, predictable result, and fixed scope. A bright-line rule like, for example, the automatic standing rule of *Jones v. United States*[180] may liberally extend Fourth Amendment protections, or it may be formulated to greatly restrict the reach of the amendment.[181] In either event, its scope remains rigidly fixed, requiring reformulation of the rule to expand or contract the situations or persons it encompasses.

The usual rationale for adopting a bright-line rule, however, is that it is clearer and simpler to apply correctly.[182] It is a formulaic approach to decision making: If a police officer is confronted with factors X, Y, and Z, he may search without a warrant. The officer need not analyze whether the totality of circumstances makes a search reasonable, or whether the purposes of the Fourth Amendment would be served by a warrantless search.

Of course, the obvious problem with such an approach is that it trades consistency of result for flexibility, and ease of application for reasoning. "X, Y, and Z" are not always so easy to define, and the officer is left completely unguided when he or she is faced with X + n, Y, and Z. Because he or she does not understand why X, Y, and Z excused a warrant in the first place, it is impossible for the officer to extrapolate from the rule to decide whether a warrant is needed in a slightly different situation.[183] Despite these problems, the Burger Court displayed an eagerness to adopt bright-line rules in search cases.[184] That the Court did so is surprising only because this development coincided with the development of reasonableness as a tool of Fourth Amendment analysis.

On the day Warren Burger was sworn as Chief Justice of the United States, the Court decided *Chimel v. California*.[185] Very much a Warren Court

180. 362 U.S. 257 (1960); *see* Rakas v. Illinois, 439 U.S. 128, 168 (1978) (White, J., dissenting). Justice Rehnquist disagreed that the rule of *Jones* was a "thoroughly workable 'bright line' test." *See id.* at 144-45.

181. For instance, the Supreme Court could adopt a standing rule permitting only persons with an ownership interest in the property searched to invoke the exclusionary rule. Such a rule would be relatively "bright-line" in its ease of application, but it would exclude those with mere possessory interest as well as all others except owners.

182. *See Rakas*, 439 U.S. at 144-47 (bright-line rules have merit of easy application and the Court has not hesitated to use them in appropriate cases).

183. When I worked as a police legal advisor, I was often asked by officers whether certain bright-line rules applied to situations slightly different from those that gave rise to the rule. My answers were often based more on political predictions about the results the Supreme Court was likely to see as desirable than on legal analysis. Like the officers I advised, I could discern no principles upon which the rules were grounded; hence, I could not predict the application of the rules in factually different circumstances. As Justice Marshall reminded the Court, "[A] rigid all-or-nothing model of justification and regulation under the [Fourth] Amendment . . . obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation." United States v. Robinson, 414 U.S. 218, 249 (1973) (Marshall, J., dissenting) (quoting Terry v. Ohio, 392 U.S. 1, 17 (1968)).

184. As Justice Rehnquist noted in *Rakas*, "Where the factual premises for a rule are so generally prevalent that little would be lost and much would be gained by abandoning case-by-case analysis, we have not hesitated to do so." *Rakas*, 439 U.S. at 147.

185. 395 U.S. 752 (1969).

decision,[186] *Chimel* replaced a rule defining the scope of search incident to arrest with a more principled approach.[187] The rule under *United States v. Rabinowitz*[188] was that a warrantless search conducted incident to an arrest could extend to the area in "possession" or "control" of the arrestee.[189] As in the *Rabinowitz* case, this meant that if a person was arrested in his residence, a thorough search of the entire residence could be conducted without a warrant, despite the fact that the arrestee was present in only one room and under the control of the police.[190] *Rabinowitz* was, in effect, a kind of bright-line "area" rule. If a person was arrested, a certain area could be searched, but there was no particularly compelling reason for searching that area in many cases.

Noting the "high function" of a search warrant,[191] the Supreme Court in *Chimel* articulated two important governmental interests that are served by permitting a warrantless search incident to arrest.[192] The first of these is protecting the arresting officer from any weapons the arrestee might obtain and use.[193] The second is preventing the arrestee from destroying or concealing evidence.[194] The scope of a search incident to arrest should, the court concluded, be circumscribed by those purposes advanced by the warrant exception.[195] Otherwise, the "high function" of the warrant should be preserved.[196] The "area" rule of *Rabinowitz* had been replaced with a "purposive" rule.

Applying the *Chimel* "rule" that only the area within the immediate control of the arrestee could be searched incident to the arrest was not especially difficult. The arresting officer's actions could be guided by the purposes underlying the exception. Only those areas into which an arrestee could reach or lunge could be searched without a warrant.[197] If the arrestee

186. *See* Israel, *supra* note 7, at 1389 (*Chimel* narrowed one of "most significant exceptions to the warrant requirement").

187. *See Chimel*, 395 U.S. at 759-68.

188. 339 U.S. 56 (1950).

189. *See* United States v. Rabinowitz, 339 U.S. 56, 62 (1950), *overruled by* Chimel v. California, 395 U.S. 752 (1969); Lewis et al., *supra* note 2, at 12.

190. *See Rabinowitz*, 339 U.S. at 59-61.

191. *Chimel*, 395 U.S. at 761.

192. *Id.* at 763.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*; *see* Israel, *supra* note 7, at 1392 (Burger Court decisions failed to carry forward *Chimel* emphasis on warrant).

197. *Chimel*, 395 U.S. at 763. Justice Stewart, writing for the majority, explained:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a

could not obtain a weapon or reach destructible evidence, there was no constitutional point in permitting a warrantless search.[198] While the rule could be applied correctly only by understanding the purposes which justified its existence, it was a conceptually simple rule.

The first significant Burger Court cases[199] dealing with search incident to arrest were *United States v. Robinson*[200] and *Gustafson v. Florida*,[201] both decided the same day. These cases tested the Burger Court's resolve to adhere to the "purposive" approach of *Chimel*.

The defendant in *Robinson* was seen driving a car by a police officer who knew that Robinson's license had been revoked.[202] The officer stopped Robinson and arrested him for "operating after revocation and obtaining a permit by misrepresentation."[203] In a search of the arrestee's breast coat pocket, the officer discovered a "crumpled up cigarette package," which he opened.[204] Inside the package, the officer found gelatin capsules containing heroin, for which Robinson was ultimately convicted.[205] The Supreme Court upheld the warrantless search of the defendant's person as incident to a

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drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" - construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Id. at 762-63.

198. Justice Stewart concluded:

> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs - or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The "adherence to judicial processes" mandated by the Fourth Amendment requires no less.

Id. at 763 (footnote omitted).

199. The Court decided *Cupp v. Murphy* in 1973. *Murphy* is not clearly a search incident to arrest case, and if it is one, its result is limited by its unusual facts. *See* Lewis et al., *supra* note 2, at 16-19. The defendant in *Murphy* was not under arrest when he went to the police station and fingernail scrapings were taken from him without his consent and without a warrant. Cupp v. Murphy, 412 U.S. 291, 292 (1973). Justice Stewart, writing the plurality opinion, cited *Chimel* as controlling the scope of the evidence seizure, but he also noted that the police had probable cause to believe Murphy had murdered his wife, and that the dried blood under his fingernails was "highly evanescent evidence" which could be recovered by a "very limited intrusion." *Id.* at 295-96. Justice Stewart would not have permitted a full search incident to arrest, but he believed this limited pre-arrest search was reasonable. *Id.* The most disquieting feature of the case is the willingness of the Court to apply a search incident to arrest rationale to a seizure occurring long before any formal arrest. *See* Lewis et al., *supra* note 2, at 16-18.

200. 414 U.S. 218 (1973).

201. 414 U.S. 260 (1973).

202. *Robinson*, 414 U.S. at 220.

203. *Id.*

204. *Id.* at 221-23.

205. *Id.*

lawful arrest, refusing to adopt the Court of Appeals' view that the scope of such a search is limited to a "protective frisk."[206]

Based on the reasoning of *Chimel*, a search incident to arrest could extend to all places in the immediate control of the arrestee, which would surely include his clothing, for the purposes of discovering weapons or destructible evidence.[207] The interesting question posed by *Robinson* was not whether the search of a person incident to arrest should be limited to a "protective frisk" only, but whether the "purposes" served by permitting the warrantless search and articulated in *Chimel* would define the scope of the search.

Since Robinson had been arrested for a relatively minor traffic offense, and one unlikely to involve a weapon, why should the arresting officer be allowed to search for a weapon? Justice Rehnquist, after citing statistics regarding the danger of traffic stops,[208] addressed the point briefly by asserting:

> It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification.[209]

The unstated point was, of course, that the reason for the search, whether the detention be fleeting or prolonged, was to protect the officer. If a warrantless search is unnecessary to satisfy that purpose, it violates the *Chimel* version of the Fourth Amendment.[210]

A tidier, more easily applied rule would ignore the purposes of *Chimel*, abandon a case-by-case inquiry into whether a particular arrestee might be armed, and permit the intrusion in every case.[211] An indication that this kind of bright-line rule might be applied in search incident to arrest cases appeared in *Robinson*:

206. *Id.* at 226-27.

207. *See* Chimel v. California, 395 U.S. 752, 763 (1969).

208. *Robinson*, 414 U.S. at 234 n.5; *see also* Edward Chase, *The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518, 540-45 (1977).

209. *Robinson*, 414 U.S. at 234-35. This passage reflects the view expressed by Justice Rehnquist in conference. *See* SCHWARTZ, *supra* note 141, at 353-54.

210. *See* United States v. Robinson, 414 U.S. 218, 239 (1973) (Marshall, J., dissenting) (scheme of Fourth Amendment is meaningful only when police are subjected to judicial scrutiny); Chimel v. California, 395 U.S. 752, 763 (1969) ("adherence to judicial processes" mandated by Fourth Amendment requires warrant for search beyond scope of search incident to arrest principle).

211. "Indeed, the majority opinions in *Robinson* and *Gustafson* may reflect a lesson suggested in several Warren Court opinions — the need for flat, simple rules that can easily be applied by police officers." Israel, *supra* note 7, at 1397; *see also* Yackle, *supra* note 63, at 401.

> A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.[212]

The extent to which this bright-line rule would control search incident to arrest was exposed in *Gustafson v. Florida*,[213] the companion case. Gustafson argued, under virtually the same facts as *Robinson*, that no evidentiary purpose was served by the search that uncovered marijuana in a cigarette box in the arrestee's pocket.[214] Gustafson had also been arrested for failure to have his driver's license in his possession while driving.[215] The court upheld the search incident to arrest, explaining that, "as our decision in *Robinson* makes clear, the arguable absence of 'evidentiary' purpose for a search incident to a lawful arrest is not controlling."[216] The import of *Robinson* and *Gustafson* was that, at least for a search of the person of an arrestee, the purposes identified by the Court in *Chimel* need not be advanced by the warrantless search at all. The arrestee could be searched thoroughly without regard for whether a weapon or destructible evidence might be uncovered.[217]

The decisions in *Robinson* and *Gustafson* may not have been faithful to the probable cause and warrant requirement, but their rule was inclusive and simple: If a person is placed under custodial arrest, he may be searched without a warrant.[218] The peripheral issues left open included whether the person searched had been placed under custodial arrest,[219] whether the search was "incident" to the arrest,[220] and what the scope might be for a search that extended beyond the person of the arrestee.

The last of these questions was answered by the Court for vehicle searches in *New York v. Belton*.[221] In *Belton*, a police officer stopped a car for

212. *Robinson*, 414 U.S. at 235.

213. 414 U.S. 260 (1973).

214. *Id.* at 263.

215. *Id.* at 262.

216. *Id.* at 265.

217. The search for weapons need not be limited to a "protective frisk." A complete search could even be conducted of places, like a crumpled cigarette package, where a weapon almost certainly could not be hidden. *See Robinson*, 414 U.S. at 233-36.

218. *See* Chase, *supra* note 208, at 541-42.

219. *See* Gustafson v. Florida, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring) (defendant's custodial arrest might not have been lawful).

220. The Court has been very liberal in applying the exception to searches conducted before and some time after the defendant's arrest. *See, e.g.*, United States v. Edwards, 415 U.S. 800 (1974) (search conducted ten hours after arrest); Cupp v. Murphy, 412 U.S. 291 (1973) (person searched not yet formally arrested).

221. 453 U.S. 454 (1981).

speeding.[222] He discovered that none of the occupants was the registered owner of the vehicle or related to its owner.[223] When the officer spotted an envelope on the floor marked "Supergold" and smelled burnt marijuana, he ordered all four occupants out of the car and placed them under arrest.[224] During his search of the passenger compartment, he looked inside a zippered jacket pocket and discovered cocaine.[225]

Purporting to apply *Chimel* to evaluate the search of the passenger compartment made incident to the arrest of the occupants, the Court concluded:

> Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]." *Chimel*, 395 U.S. at 763. In order to establish the workable rule this category of cases requires, we read *Chimel's* definition of the limits of the area that may be searched in light of that generalization. Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.[226]

Containers within the passenger compartment are also subject to warrantless search under *Belton* because, the Court explained, if the passenger compartment is within reach of the arrestee, so is a container within it.[227]

The problem with the Court's logic is that it proceeds from the faulty premise that the passenger compartment is within the reach of the arrestee.[228] No police officer would be so foolish as to permit any arrestee to reenter his vehicle without being under the closest supervision. Nor would any police officer allow an arrestee to stand unguarded within lunging distance of the passenger compartment. In short the "area of immediate control" definition of *Chimel* is "unworkable"[229] in this context only because it does not allow the police to search the passenger compartment without a warrant.[230]

222. *Id.* at 455.
223. *Id.*
224. *Id.* at 455-56.
225. *Id.* at 456.
226. *Id.* at 460 (footnote omitted).
227. *Id.*
228. There is no evidence in the *Belton* opinion that any of the four arrestees would have been permitted to reenter the car, or that they were within reach of the passenger compartment.
229. *See Chimel*, 453 U.S. at 460 ("courts have found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant").
230. "Immediate control" is no more difficult to determine in vehicle cases than in residential arrest cases. If the arrestee can reach or lunge to obtain a weapon or destructible evidence from the vehicle passenger compartment, that part into which he can reach or lunge is within the arrestee's immediate control. *See* Chimel v. California, 395 U.S. 752, 763 (1969). Of course, no self-respecting police officer would ever permit an arrestee to be within reach of

Belton, like *Robinson* and *Gustafson*, adopts a bright-line approach[231] that works to the advantage of law enforcement. All three cases virtually abandon the purposes behind search incident to arrest and return the exception to a mechanical rule of the sort the Court rejected in deciding *Chimel*. Once a person is placed under custodial arrest, his or her person may be searched thoroughly; the area in his or her immediate control may be searched thoroughly; and, if the arrest involved a vehicle, the passenger compartment may be searched thoroughly.[232] None of these rules of scope need have the least thing to do with any constitutional policy reason for dispensing with a warrant.

Formalism requires the logical person to disregard the dictates of reason and blindly accept outcomes in the interest of expediency. However, if the return to a formalistic evaluation made more certain the job of law enforcement, or the application of the exclusionary rule, it would have at least that virtue. Unfortunately, once the Court applied its search incident to arrest formalism beyond the person of the arrestee, the rule lost even its claim to clarity.[233]

This difficulty of application is reflected in the *Belton* opinion.[234] The Court felt constrained to note, for example, that the lawfulness of the custodial arrest had not been questioned;[235] that it was not overruling *Chimel* (a mistake any reader of the opinion might have made);[236] that "container" includes any "object capable of holding another object";[237] and that the holding extends only to the passenger compartment, and not to the trunk.[238] Even with these guidelines, the application of *Belton* is difficult once the factual basis varies from that in the decision. Suppose that the glove compartment or console within the passenger compartment is locked.[239] The Court says it is a "container," but is it subject to search incident to arrest? If the purposes of *Chimel* have any meaning, the answer will usually be "no." But if *Belton* has completely cut the exception loose from *Chimel's* doctrinal moorings, perhaps it would not matter if these "containers" were welded shut.

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the passenger compartment of a car from which he has just been arrested unless the officer is attempting to manipulate the *Chimel* area to justify a warrantless search.

231. *See* SCHWARTZ, *supra* note 141, at 354 ("Need for a case-by-case assessment was largely eliminated" in *Belton*).

232. For purposes of searching containers within vehicles, it makes no difference whether the container could hold a weapon. *Belton*, 453 U.S. at 461.

233. *See* Steven D. Clymer, Note, *Warrantless Vehicle Searches and the Fourth Amendment: The Burger Court Attacks the Exclusionary Rule*, 68 CORNELL L. REV. 105, 139-40 (1982) (bright-line rule of *Belton* leaves questions unanswered).

234. *See Belton*, 453 U.S. at 460-61.

235. *Id.* at 460 n.2.

236. *Id.* at 460 n.3.

237. *Id.* at 460 n.4.

238. *Id.* at 460 n.4.

239. *See* Clymer, *supra* note 233, at 139.

Why is the trunk not within the "area" that can be searched incident to arrest? It cannot be because it is outside the "immediate control" of the arrestee because that fact makes no difference when the sanctity of the passenger compartment is at stake. Is it only because the Court says so?

If control is unimportant, may a police officer search the passenger compartment hours, or days, after a custodial arrest?[240] And what is a "custodial" arrest? How does it differ from a "noncustodial" arrest?[241]

These questions are not merely rhetorical. Real cases turn upon the answers, and real police officers have no way to derive the answers.[242] The rule is not built on a doctrinal foundation, and for that reason it is less clear than the "unworkable" rule of *Chimel*.[243] A reasonably trained police officer could make intelligent predictions about the answers to most of these questions by using the purposive approach of *Chimel*. The answers might sometimes mean that the scope of the search was excessive and the exclusionary rule would be applied; in other cases, hopefully in most, the officer would correctly limit his or her search in a way that would satisfy the needs underlying the exception.

The Burger Court's Fourth Amendment Legacy

These examples of the development of reasonableness analysis and bright-line rules, while not exhaustive, illustrate the character and texture of the Burger Court interpretations of the Fourth Amendment. Certainly, no "strategy" can be ascribed to any one Justice, or to the Court as a whole, on the basis of these decisions alone, but the patterns they form are at least imperfect empirical evidence of the decision making proclivities of that Court.

It is important to remember that the Burger Court did not invent either reasonableness analysis or formalism. Moreover, neither method is "evil" nor necessarily antithetical to the principles of the Fourth Amendment. They are merely modes of analysis (or, in the case of formalism, nonanalysis) which can, when used with care and understanding, be useful tools of adjudication.

The Burger Court misused reasonableness by not really using it at all. Its decisions employing reasonableness substantively to defeat the probable cause,

240. In United States v. Edwards, 415 U.S. 800 (1974), the Supreme Court upheld a search incident to arrest of a vehicle conducted ten hours after the arrestee had been taken to the station. *Id.* at 803. The search may be made incident to arrest "even after a substantial period of time has elapsed." *Id.* at 807. Since the vehicle is out of the control of the arrestee as soon as he is removed from the scene, why is the period limited at all? Is the issue merely an evidentiary one, and not a constitutional question?

241. The Texas Court of Criminal Appeals confronted this issue and held that routine traffic stops are not custodial absent some objective evidence that the officer intends to take the vehicle occupant to the stationhouse. *See* Linnett v. State, 647 S.W.2d 672 (Tex. Crim. App. 1983).

242. *See* George Kannar, *Liberals and Crime: The Reclaiming of an Issue*, NEW REPUBLIC, Dec. 19, 1988, at 20-21 (exceptions like search incident to arrest make it impossible for officers to figure out how to act).

243. *See* New York v. Belton, 453 U.S. 454, 460 (1973) (definition of "immediate control" not "workable" in vehicle search incident to arrest cases).

warrant, and individualized suspicion requirements have such a quality of sameness that the most sympathetic reader cannot avoid feeling that no real effort at balancing was made. The cases are too consistent in their outcomes to lend authenticity to the Court's claim that a careful weighing of interests was being undertaken in each case.[244]

This cynicism could have been ameliorated by evidence in the other uses of reasonableness that the Burger Court was shaping a new, but equally principled, vision of the Fourth Amendment. Instead, the cases defining search share the remarkable consistency of those recognizing "special needs."[245] All of them took a little piece of privacy;[246] in Professor Alschuler's words, they waged "guerilla warfare" on the Fourth Amendment.[247] Because Chief Justice Burger contributed significantly to the substantive and definitional use of reasonableness, he bears much personal responsibility for leading the Court in this direction.

In the standing cases also, the Chief Justice routinely voted with Justice Rehnquist to abandon a more inclusive, but clearer rule, and adopt a more exclusive and vaguer analytical method. This is not very revealing in itself, but taken as part of a pattern of decisional choices, it confirms that his philosophical bearings were in favor of law enforcement and opposed to those who were presumed to be factually guilty.[248]

Perhaps Chief Justice Burger's noted antipathy for the exclusionary rule[249] motivated him to find ways to insure that the Fourth Amendment was not

244. "When measure after measure is removed from one side of the balance without tipping the scales, it can only be because gravity is stayed by an interested hand." Gerald S. Reamey, *New Jersey v. T.L.O.: The Supreme Court's Lesson on School Searches*, 16 ST. MARY'S L.J. 933, 949 (1985).

245. As Professor Yale Kamisar observed:

> Even more disquieting than the manner in which the present Court has narrowed the scope of the exclusionary rule is the way in which it has narrowed the substantive protection provided by the Fourth Amendment. By taking a crabbed view of what constitutes a "search" or "seizure," the Court has put no constitutional restraints at all on certain investigative techniques that may uncover an enormous quantity of personal information.

Kamisar, *supra* note 7, at 74; *see also* SCHWARTZ, *supra* note 141, at 349-52.

246. Professor Wasserstrom wrote of the Burger Court's use of reasonableness in the definition of "search":

> The Burger Court, however, has not taken advantage of the added flexibility which a sliding scale test of reasonableness should afford. On the contrary, the Court has exempted a variety of police practices from even the fourth amendment requirement of reasonableness, by ruling that they are not "searches and seizures" at all, and, so, the Court has left the police free to act in many areas as arbitrarily as they wish.

Wasserstrom, *supra* note 15, at 310.

247. Alschuler, *supra* note 13, at 1442.

248. *See* Chase, *supra* note 208, at 588 (Burger Court more concerned with "factual guilt" than with "legal guilt").

249. Warren Burger's most noted attack on the exclusionary rule came in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 411-24 (1971) (Burger, C.J., dissenting). However, even before his appointment to the Supreme Court, his

violated, or that the criminal defendant had no chance to litigate the violation to a court.[250] Whether these decisions are properly viewed as indirect attacks on the exclusionary rule,[251] and there were many direct attacks by the Burger Court,[252] or as collateral instances in which the Fourth Amendment was modified to achieve a desired result, the net result was the weakening of the amendment's prohibition.[253]

Bright-line rules that make the protections of the Fourth Amendment more available, or expand the substantive reach of those protections, might not infringe on the ultimate purposes of the right. However, it is almost inevitable that formalistic, formulaic, or bright-line rules will, if given much scope and if designed to circumscribe the rights of the individual, prove inconsistent with the principles of the Fourth Amendment. This is so because by their nature these rules operate mechanically to decide the endless variety of cases involving search and seizure. The weighing or balancing of privacy interest is done abstractly and prospectively. A court convinced that law enforcement requires more latitude to effectively combat crime will likely skew the design of the formula to comport with its criminal justice perspective, and that skewing will eventually exacerbate the mistakes that inhere in this crude form of decision making. If bright-line rules are to be used at all in search and seizure cases, they should initially favor the individual rather than the state. Better yet, the Court should simply avoid such rules unless it is certain that the rule contemplated will do more constitutional good than harm.

The Burger court used bright-line rules, as it had reasonableness analysis, to advance its crime control agenda.[254] Evidence of this is found in the

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views were well known. *See* Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1 (1964); *see also* Burkoff, *supra* note 85, at 160-61.

250. *See* Burkoff, *supra* note 85, at 160-61; LAFAVE & ISRAEL, *supra* note 100, at 80-84.

251. *See* Clymer, *supra* note 233, at 143-44 (Supreme Court's reluctance to apply exclusionary rule led to expanded warrant exceptions in vehicle search cases).

252. *See supra* note 250.

253. Professor George Kannar summarized the effect of warrant exceptions like search incident to arrest on the exclusionary rule:

> The Burger Court consistently failed to recognize that exceptions of this sort can only be kept from swallowing the rule if they are *kept* narrowly - and clearly - limited. Out of a misplaced zeal to punish individual malefactors, it began behaving like a neighborhood police court, cluttering its docket with insignificant cases simply because it could not bear the sight of particular individuals going free. In the process, the Republican-dominated Court converted Fourth Amendment jurisprudence into the impossibly confused quagmire it is today - piling exception upon exception, creating exceptions *to* exceptions, until not even the legal treatise writers can figure out exactly what the law is, or conscientious officers figure out how to act. In short, it was the conservative Burger Court, not the liberal Warren Court, that made search and seizure law a labyrinth of muddled "technicalities." And then opponents of the exclusionary rule seized upon the mess conservatives had themselves created as an excuse for abolishing the rule completely.

Kannar, *supra* note 242, at 20-21.

254. Professor Geoffrey Stone observed: "If there is one area in which the Burger Court's decisions seem most clearly to reflect a self-conscious 'agenda,' it is in the realm of constitu-

abandonment of a bright-line standing rule that tended toward inclusion of claims.[255] The Burger Court replaced that rule with a reasonableness analysis that tended to exclude Fourth Amendment challenges.[256]

The dismantling of the *Jones*[257] rule was not, however, a sign that the Burger Court disapproved of bright-line rules generally. The Court moved deliberately in the area of search incident to arrest to undo the Warren Court's purposive analysis and replace it with a bright-line rule.[258] In *Belton*,[259] *Robinson*,[260] and *Gustafson*,[261] the Court systematically erected "area" rules for search incident to arrest, first for the person of the arrestee, and eventually for the arrestee's vehicle. With scarcely a word of explanation, other than that the previous rule was "unworkable,"[262] the Burger Court refused to impose on law enforcement the duty to think and consider before searching.[263]

There was no noticeable hue and cry from the public protesting the Court's denigration of its privacy rights, and for several reasons none could have been expected. Even lawyers not involved in the criminal justice process would hardly be perturbed by the apparently minor, although numerous, changes in the Fourth Amendment during the Burger years. The public could hardly be alarmed by the restriction of the "standing" requirement, or even the expansion of the search incident to arrest exception, since relatively few people have heard of either. Moreover, the characterization of the Burger Court as a "law and order" Court in search and seizure cases, or that it threatened the exclusionary rule, would more likely have been applauded than denounced. Even knowledgeable commentators who agreed that the Court was denigrating the Fourth Amendment took comfort in the Fifth and, especially, the Sixth Amendment cases where they discerned a more balanced approach.[264] The shape of the down-sized "new" Fourth Amendment is only now becoming clear.

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tional criminal procedure." Stone, *supra* note 1, at 12; *see also* Chase, *supra* note 208, at 546 (*Robinson* represents movement toward elimination of Fourth Amendment as a restriction on conviction).

255. *See* Jones v. United States, 362 U.S. 257 (1960). *But see* Rakas v. Illinois, 439 U.S. 128, 144-45 (1978) (abandoned rule of *Jones*; not a workable bright-line test).

256. *See supra* note 178.

257. Jones v. United States, 362 U.S. 257 (1960) (standing "automatic" if possession offense; otherwise, granted if accused "legitimately on premises").

258. *See* New York v. Belton, 453 U.S. 454 (1981); Clymer, *supra* note 233, at 133-34.

259. New York v. Belton, 453 U.S. 454 (1981).

260. United States v. Robinson, 414 U.S. 218 (1973).

261. Gustafson v. Florida, 414 U.S. 260 (1973).

262. Ironically, the bright-line standing rule of *Jones* was "unworkable," so it was replaced by an ad hoc reasonableness analysis. *See Rakas*, 439 U.S. at 144-45. On the other hand, the ad hoc analysis of *Chimel* was "unworkable" for car searches, so it was replaced by a bright-line rule. *See Belton*, 453 U.S. at 460.

263. While purporting to respect law enforcement, the underlying message of the bright-line cases is that the Burger Court considered police officers incapable of analyzing factual situations and making constitutional decisions.

264. *See* Alschuler, *supra* note 13; Friedman, *supra* note 12; Israel, *supra* note 7, at 1387

The ascent of reasonableness analysis and selective use of bright-line rules during the Burger Court years may have been the result of a conscious strategy to accomplish with small attacks on unknown places exactly what could have been done by overruling *Mapp v. Ohio*.[265] Or it may have been, as some argue, the result of an "essential lack of vision and commitment."[266] Perhaps it was something in-between.[267] Perhaps the Fourth Amendment decisions of the Burger Court were produced by a floundering Court that eventually saw what it could do and began to appreciate it for a true strategy. And perhaps the Burger Court's example has become the Rehnquist Court's Fourth Amendment *modus operandi*. In any event, the search and seizure decisions of the Burger Court, inelegant by comparison with those of the Warren Court, radically altered not just the reach and shape of the Fourth Amendment, but also the process by which search issues are decided. The law and order agenda of the Court was not hidden, but its results were obscured by the narrow focus of the decisions and the patient use of strategies of confusion. When the smoke cleared, much of the Fourth Amendment had disappeared, but not by magic.

(Burger Court's search and seizure decisions probably more sharply criticized than any other decisions involving regulation of police practices).

265. 367 U.S. 643 (1961). Professor Edward Chase suggested that "although the major doctrinal stroke of eliminating the exclusionary rule entirely in fourth amendment cases, or of refusing to apply it when the police act in good faith, has not occurred, enough has been done to render the fourth amendment virtually meaningless to the criminal defendant." Chase, *supra* note 208, at 551.

266. *See* Alschuler, *supra* note 13, at 1449-50.

267. Professor Edward Chase has described the Burger Court's criminal procedure decisions as "wholesale and rash," reflecting a "preoccupation with accurate results in individual cases." Chase, *supra* note 208, at 519. According to Chase, "This generates a set of consistent results across doctrinal lines, a consistent method of decisionmaking, and a particular vision of the criminal process." *Id.*